

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIO & SONS COMPANY,

Plaintiff,

-against-

TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA,

Defendant.

USDC SDNY
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No. 2008 CIV. 03001 (RJH)

AGREED SCHEDULING
ORDER PURSUANT TO FED. R.
CIV. P. 26(F)

Pursuant to Federal Rules of Civil Procedure 26(f) and 16(b), this Court's Order dated April 1, 2008, which directed counsel to confer and submit an agreed Scheduling Order, and this Court's ensuing order scheduling the initial conference in this Case for July 11, 2008, the Parties conferred on all matters designated in the Order and jointly make the following report to the Court:

I. Description of the Case

A. Attorneys of Record

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B. Basis for Federal Jurisdiction

Jurisdiction before this Court is proper because there exists diversity between the parties and the amount in controversy exceeds \$75,000 exclusive of interest and costs. Plaintiff Julio & Sons Company (“Julio”) is a Delaware corporation with its principal place of business in Dallas County, Texas. Defendant Travelers Casualty And Surety Company of America (“Travelers”) is an insurance company incorporated under the laws of the State of Connecticut, with its principal place of business also in Connecticut.

C. Claims Asserted in the Complaint and Proposed First Amended Complaint

This is a coverage action related to the Directors and Officers Liability Coverage Part of a two part commercial liability insurance policy issued to Julio by Travelers (the “Policy”). The Complaint and the Proposed First Amended Complaint assert claims for breach of contractual and legal duties arising out of Travelers’ determination that coverage is not available under the Policy for certain underlying lawsuits described in the Complaint and Proposed First Amended Complaint. The Complaint and Proposed First Amended Complaint also seek an injunction requiring Travelers to advance defense costs that Julio has now incurred in a subsisting underlying litigation. Julio also seeks compensatory damages equal to the amount of its reasonable defense costs and settlement costs incurred in two other, concluded, litigations. Julio also seeks declaratory relief and extra-contractual relief.

Although Travelers has not asserted any Counterclaims, its Answer to the Complaint enumerates its defenses to coverage and requests an order dismissing the Complaint with prejudice.

D. Legal & Factual Issues in the Case

1. The Parties agree that the issue of whether or not the Policy provides coverage for each of the underlying lawsuits, in whole or in part, is an issue of law which may be subject to summary disposition as a matter of law.

3. In the event that it is determined that coverage is available with respect to any underlying lawsuit, in whole or in part, then the case presents a mixed issue of law and fact with respect to the reasonableness and allocation of defense costs and settlements incurred.

4. With respect to Julio's extra-contractual claim for bad faith under Texas statutory law, the liability issue is a mixed question of law and fact as to the elements of such tort specified in the statute.

5. With respect to Julio's extra-contractual claim for attorney's fees in this action under Texas statutory law, the liability issue is a mixed question of law and fact as to the elements of such tort specified in the statute.

6. Travelers does not assert any counterclaims. However the Declaratory Judgment Act requires that, upon determining that a declaratory judgment is proper, the Court should declare the rights and legal relationships of the parties. *See also* Fed. R. Civ. P. 54(c).

E. Description of the Relief Sought

Julio seeks (i) an injunction compelling Travelers to advance defense costs which Julio has incurred and continues to incur, on an ongoing basis, in a subsisting suit against Julio; (ii) a declaratory judgment, finding that Travelers breached the insurance contract between the parties; (iii) compensatory and punitive damages; and (iv) statutory attorney fees.

II. Proposed Case Management Plan


A. Pending Motions

1. Leave for Serving First Amended Complaint

Counsel for Julio has presented counsel for Travelers with a proposed First Amended Complaint and requested that Travelers stipulate to Julio's filing of same. Travelers believes that a substantial portion of the amendment is futile as the amendments seek coverage for an additional underlying lawsuit with respect to which Travelers believes coverage is not available under the Policy. Nonetheless, Travelers will stipulate to Julio's filing of the First Amended Complaint and will accept service subject to Travelers' reservation of the right to seek summary adjudication of Julio's claims for coverage as part of the summary adjudication motion referred to below. Travelers stipulates to filing of the First Amended Complaint on or before July 15, 2008, and will file an answer thereto by July 28, 2008.

2. Preliminary Injunction and Summary Adjudication

The Parties agree that on July ¹¹~~10~~, 2008, Julio will file its Motion for Preliminary Injunction seeking advancement of defense costs incurred in defense of the subsisting "RRGC" suit. Julio believes that such relief is justified under the holding in *In re*



WorldCom, Inc. Securities Litigation Master File, 354 F. Supp. 2d 455 (S.D.N.Y. 2005).

Although this motion will address only defense of the ongoing RRG suit, Travelers contests Julio's entitlement to defense costs for the RRG suit as well as each of the underlying suits and intends, in addition to responding to the Motion for Preliminary Injunction, to seek permission of the Court to bring a motion for summary adjudication of no coverage for each of the underlying lawsuits described in the Complaint. Julio believes that the preliminary injunction motion should be handled in a separate hearing and, while Travelers does not object to a separate hearing, Travelers believes that the likelihood of success factor of the injunction motion is substantially identical to, and will involve the same issues that will be the basis of the summary adjudication motion such that they should be handled together rather than on successive motions. In any event, the Parties agree that if the Court prefers to handle the preliminary injunction motion separately, the briefing dates will be as follows:

Travelers' Response to injunction motion due: August ¹⁵ 1, 2008
 Julio's Reply on injunction motion due: ^{Sept. 3} ~~August 18~~, 2008
^{Heaven} ~~Sept 19, 2008 at 11:00 a.m.~~

If the Court prefers that the injunction motion and the motion for summary adjudication be handled in a coordinated fashion, preparation of the briefing on the motion concerning all of the underlying lawsuits will require additional time, and the parties will confer to modify the briefing schedule.

B. Proposed Cutoff Date for Joinder of Additional Parties: The Parties propose a cutoff date of August 15, 2008, for the joinder of additional parties.

C. Proposed Cutoff Date for Amendments to Pleadings: The Parties propose a cutoff date of September 1, 2008 for amendments to the pleadings.

D. Proposed Schedule for Completion of Discovery: The Parties propose the following deadlines for completion of discovery:

1. Rule 26(a)(1) disclosures: August 1, 2008
2. Fact Discovery: September 30, 2008
3. Rule 26(a)(2) Disclosures: October 15, 2008
4. Expert Reports: November 15, 2008
5. Rebuttal Expert Reports: December 15, 2008

E. Proposed Deadline for Filing Dispositive Motions: The Parties propose the date of December 31, 2008 as the deadline for filing any dispositive motions.

F. Proposed Date for Filing Final Pretrial order: The Parties propose the date of December 31, 2008 as the deadline for filing the final Pretrial Order.

G. Proposed Trial Schedule

1. Jury Demand? Yes
2. Probable Length of Trial: 5 days
3. Trial-Ready Date: March 1, 2009

III. Proceeding Before a Magistrate Judge

The Parties do not unanimously consent to proceed before a Magistrate Judge.

IV. Status of Settlement Discussions

At this time, the Parties have not held any settlement discussions and do not request a settlement conference.

Jointly submitted,

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SO ORDERED
OK / [Signature]
USDT
7/14/08